IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. ~~264~~ 34

HALLIBURTON OIL WELL CEMENTING COMPANY,

Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

REPLY BRIEF FOR THE APPELLANT

Robert O. Brown,
General Counsel for Appellant

Robert E. Rice,
Assistant General Counsel
Duncan, Oklahoma

Of Counsel:
Laurance W. Brooks
James R. Fuller
Charles W. Phillips
William G. Randolph
Frank W. Middleton, Jr.
Robert J. Vandaworker
Tom F. Phillips

Baton Rouge, Louisiana
February 14, 1962

C. Vernon Porter
and
Benjamin B. Taylor, Jr.

Taylor, Porter, Brooks,
Fuller & Phillips, Attys.
1100 La. Nat'l Bank Bldg.
Baton Rouge, Louisiana

Counsel of Record Upon
Whom Service May Be Made

Franklin Press, Inc. Baton Rouge, La.

CONTENTS

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 264

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

REPLY BRIEF FOR THE APPELLANT

May It Please the Court:

The Positions Taken by the Louisiana Collector

1. What Are Those Positions?

2. The Fallacies of Each.

The Collector's brief is somewhat difficult to analyze because the Collector does not "stay put," but vacillates between two inconsistent positions.

We submit that the following is an accurate and fair analysis of the situation, and of the Collector's varied positions:

Halliburton asserted its propositions as follows:

A. THE LAW:	Tax discrimination against interstate commerce is forbidden by the Federal Constitution. This is the rule.
B. THE FACT:	The Louisiana Tax Collector is discriminating against interstate commerce.
C. THE CONCLUSION:	The discrimination by the Louisiana Tax Collector is an unconstitutional burden upon interstate commerce.

Facing these propositions, the Collector could take only three possible positions:

(1) He could *admit* the propositions.

(2) He could *deny* the propositions.

(3) He could *confess and avoid.*

This is axiomatic.[1]

With reference to Halliburton's first Proposition "A," "*The Law*," the Louisiana Collector has "admitted." He states:

[1] See Paton, George W., *A Text Book of Jurisprudence*, 2nd Ed., 1951, Oxford University Press, Amen House, London, E.C. 4th, England, at p. 479.

"We concede that the State of Louisiana may not impose taxes designed to favor its own residents and to tax more heavily non-residents."[2]

* * *

"The Constitutional Principles that a state may not discriminate against interstate commerce and that a state may not place a more onerous burden on a non-resident taxpayer than it does upon a resident taxpayer in similar circumstances are well established.

* * *

"The State of Louisiana does not quarrel with those established principles."[3]

* * *

"It is . . . well settled that a state may not levy a tax which discriminates against interstate commerce or which does not afford equal taxation to residents . . . [and] non-residents."[4]

The Louisiana Collector thus admits Halliburton's Proposition "A," *"The Law,"* that the interstate commerce clause forbids tax discrimination against interstate commerce. This leaves for discussion only the correctness of the propositions:

B. THE FACT: The Louisiana Tax Collector is discriminating against interstate commerce, and

C. THE CONCLUSION: The discrimination by the Collector is an unconstitutional burden upon interstate commerce.

[2] Brief of the Appellee, at p. 2.
[3] *Ibidem*, at p. 11.
[4] *Ibidem*, at p. 18.

Proposition "B" is a conclusion of fact, whether or not there is discrimination, and Proposition "C" is a conclusion of law to be drawn by the application of the legal proposition "A" to the facts "B."

What does the Collector say about Halliburton's Proposition "B," *The Fact*?

Having admitted Proposition "A," the Collector could avoid the conclusion of Proposition "C" in only one of two ways:

First: He could *deny* Proposition "B" that there is in fact any discrimination against interstate commerce.

or

Second: He could *confess and avoid* Proposition "B," i.e., he could concede that there was discrimination, and he could argue that such discrimination was not prohibited by the Federal Constitution, for some reason which is an exception to the general rule.

A careful examination of the Collector's brief shows that he shifts back and forth between these two positions. To put him in a frame of reference that can be dealt with, we submit that he has taken both positions, that is to say:

First: He denies that there is any "discrimination,"

AND

Second: He argues that the "discrimination" here is a *justifiable discrimination* which does not offend the interstate commerce clause.

The Collector has not made these arguments in the alternative. He has made them simultaneously despite the obvious conflict and inconsistency. This is the reason that it is somewhat difficult to untangle and reveal the speciousness of his positions. As heretofore indicated, there is a substantial lack of correlation between the Collector's Brief to the Louisiana Supreme Court, his Motion to Dismiss, and his present Original Brief. However, we submit that the foregoing is a fair analysis of the shifting sands upon which, from time to time, he has chosen to stand.

The Collector's Present Avowed Position—Denial—

Although he has not consistently taken this position, the Collector's current official position, with reference to the existence of tax discrimination against interstate commerce, is that of a flat denial.

The Louisiana Collector states, in his brief,

". . . A state may not discriminate against interstate commerce.

* * *

"The State of Louisiana does not quarrel with those established principles.

"Louisiana does, however, emphatically *deny* that its sales and use tax laws are in contravention of those principles. . . .

* * *

". . . the . . . tax law reveals . . . perfectly complementary taxes . . .

(at pp. 10-11)

* * *

"There is no discrimination against interstate commerce. . . ."

(at pp. 13-14)

* * *

"There is . . . perfect equality of treatment . . ."

(at p. 14)

* * *

"The purpose of the use tax is to equate the 2% use tax burden with the 2% sales tax burden . . .

(at p. 16)

* * *

"Both taxes are imposed upon cost . . .

(at p. 16)

* * *

"In Louisiana all taxpayers enjoy the same treatment . . ."

(at p. 27)

And, summarizing his position, the Collector says:

"The *sales* and *use* taxes are . . . identical taxes.

"The *taxpayer*, the *moment of taxation*, the *measure of the tax* and the *tax rate* is the same."[5]

(at p. 21. Emphasis by the Collector)

---

[5] "Cap, what I tell you three times, is true," Carroll, Lewis, *Alice's Adventures in Wonderland, Through the Looking Glass and The Hunting of the Snark*, Random House—Modern Library Edition, New York, at p. 321. From *The Hunting of the Snark*, "The Landing," 2nd Stanza, fourth line.

The Collector's Denial of Fact Is Not Supported by the Record.

The unsoundness of the Collector's "denial" position readily appears from the Stipulation of Facts and from basic arithmetic.

The issue of fact here is simply whether or not the Louisiana sales and use tax statute does ". . . in its practical operation work discrimination against interstate commerce."[6]

The Collector argues that the percentage rate of both taxes is fixed at 2%. Thus, he says that the "rate of tax" is the same in both taxes. He is correct on this point.

But when he applies this identical 2% tax rate to the two situations, he produces for Halliburton's interstate situation a tax burden of $40,642.65, which he stipulates would not be due if Halliburton's operation were wholly intra-state.

Obviously two "identical taxes" cannot produce unequal results.

Elementary arithmetic tells us that, if the same percentage factor (2%) is applied to two situations, and a different tax dollar result appears, then the tax base (to which the 2% is applied) must be different.

Mathematicians tell us that, in dealing with two positive quantities, one of three circumstances must exist: Either A is equal to B, or A is less than B, or A is greater than B.[7]

Here the issue is one step simpler than that: Either A is equal to B, or A is greater than B.

---

[6] Best v. Maxwell, 311 U.S. 454, 61 S.Ct. 335, 85 L.Ed. 275 (1940).

[7] *Encyclopedia Britannica*, 1957 Edition, Verbo "Arithmetic," Vol. 2, p. 355.

Appellee, the Louisiana Collector says:

"There is . . . perfect equality."

(Brief of Appellee, at p. 14)

Appellant, Halliburton, says:

"There is inequality. The taxes are not 'identical.'"

A dispute as simple as that ought not to be difficult to resolve.

Appellant respectfully submits that this simple issue may be clearly resolved by seeking the answer to one simple question, namely:

> If the Louisiana Collector be upheld in his position, would the tax burden upon Halliburton be no greater than that burden would be if Halliburton moved its shops to Louisiana and operated a wholly intra-state business?

Restated:

> If the elements of multi-state operation and interstate movement of goods were eliminated from the operative facts of this case, would the tax demanded by the Louisiana Collector be exactly the same, or would it be less?

Restated:

> If there were in Louisiana a direct competitor of Halliburton, carrying on a wholly intrastate operation, would that competitor be required to pay exactly the same number of dollars (in sales and use tax moneys) or would its sales and use tax burden be smaller than that of Halliburton which carries on a multi-state operation and moves its equipment in interstate commerce?

Of course, the answer to these direct questions is not debatable. The answer is found in the Stipulation of Facts upon which this case is submitted.

In this case, the Louisiana Collector demands that Halliburton pay $40,642.65 in tax dollars, under the Louisiana sales and use tax statute. Simultaneously, the Louisiana Collector has stipulated, as to the two phases of this case,

First: As to the Labor and Shop Overhead Phase—

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside Louisiana; but there would have been no Louisiana sales tax or use tax upon the Labor and Shop Overhead."
>
> (R. 26-27)

Second: As to the Isolated Sales Phase—

> ". . . the entire . . . [purchase price] would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana."

Appellant taxpayer respectfully asserts that it is unable to see any complexity to the problem. Absent the elements of multi-state activity and interstate movement of goods, the Collector demands no tax. Add the elements of multi-state activity and interstate movement of goods, and the Collector demands the tax. This, appellant submits, amounts to discrimination which is offensive to the interstate commerce clause of the Federal Constitution. Q.E.D.

In the face of his own stipulation that he would thus discriminate, how does the Collector couch his arguments that ". . . there is perfect equality . . ." in the two (intrastate and interstate) situations?

* * *

Without articulating that this is what he is doing, and thoroughly intermingling his two arguments, the Collector nevertheless shifts away from his official "denial" position and adopts the "confession and avoidance" technique of defense.

The Collector totally ignores and passes over the simple fact that, if the taxes were "identical" in their "practical operation," they could not produce substantially different tax results. He does not mention this fundamental discrepancy in any of his briefs to any court. He makes no effort to explain how an "identical" tax which ". . . provides perfect equality of tax treatment . . ." could produce $40,642.65 more taxes in the interstate situation than it produces in the intrastate situation.

Having asserted his "denial" of discrimination, and having passed without comment the unequal tax result, and ignoring his own stipulation, the Collector proceeds to the main portion of his brief to this Court. We submit that, although he has not told the Court that this is his plea of "confession and avoidance," nevertheless his primary arguments may accurately be so characterized.

The Collector's Actual Position— Discrimination Is Justifiable.

Let us examine the Collector's "confession and avoidance" pleas. What has he said to support his position that the stipulated "discrimination" is justifiable and not unconstitutional?

First: The Discrimination Is Only Incidental, and Is De Minimis—

In his Motion to Dismiss (at p. 9), the Collector argued that the discrimination was only incidental and *de minimis*. He put it this way:

> "Louisiana has accomplished *almost* perfect equality of the 2% tax burden."

This is one of the Collector's arguments which was echoed and adopted by the Louisiana Supreme Court, when it concluded that:

> ". . . the law contains no . . . discrimination; . . ."
>
> "Labor and shop overhead are considered *incidentally* . . . as a basis for arriving at cost."[8]

This plea of justifiable discrimination has been considered at some length at pp. 58-60 of Appellant's Original Brief and, we submit, has been fully refuted. We have shown (at p. 59) that for Halliburton and the seven taxpayers who filed briefs *amicus curiae*, the tax moneys dependent upon this issue were not *de minimis* dollarwise. In round figures, a quarter of a million dollars difference, in tax moneys, is involved in the tax years already at issue. And similar taxes accrue from year to year.

In Halliburton's case, the labor and shop overhead, which the Collector seeks to include in the tax base, amounted (for 1952 through 1955) to the sum of $1,547,109.70. (R. 28) It is 2% of this sum (included in the tax base) which produces the $30,942.20, the principal sum demanded upon the labor and

[8] See full quotation in Appellant's original brief, at p. 38.

shop overhead phase of this case. (R. 24) We submit that the inclusion or exclusion of $1,547,109.70 from a tax base is a matter which cannot be described as *de minimis*. We submit that the discrimination here is "substantial."

Lest it be argued that the discrimination is only large in dollars and not in the proportion of the total tax, we point out that, in Halliburton's case:

	Dollars	*Per Cent*
Cost Element No. I (components) amounted to	$ 717,992.69[9]	31.7%
and		
Cost Element No. II (labor and overhead) was	1,547,109.70[10]	68.3%
TOTAL COST	$2,265,102.39	100.0%

Arithmetic tells us here that 68.3% of the use tax levied upon Halliburton in this particular case was dependent upon the inclusion in its tax base of the labor and shop overhead (Cost Element No. II) which the Collector, by stipulation, would exclude from the tax base if Halliburton operated wholly in Louisiana.

Put another way, the Collector now seeks to tax Halliburton more than 300% of what the tax would be if Halliburton moved its shops to Louisiana. The discrimination here is not *de minimis* either in dollars or in the percentage of tax moneys involved.

As to the "isolated sales" phase, the "ratio" of discrimination is 100%-to-zero.

---

[9] Col. 2, Annex 10 to Halliburton's Original Petition. R. 28.

[10] Col. 5, Annex 10 to Halliburton's Original Petition. R. 28.

For obvious reasons, the Collector has abandoned his contentions that the discrimination is only *incidental* and *de minimis*. That line of argument does not appear in the brief on the merits.

Second. This Is Not an Interstate Commerce Problem!

To justify his stipulated substantial discrimination, the Collector argued to the Louisiana Supreme Court that there is no question of interstate commerce involved. Appellant has never understood how such an argument could be seriously advanced, but it was advanced by the Collector and it was adopted and echoed by the Louisiana Supreme Court, viz.,

> "We find that the instant matter does not involve a question of interstate commerce."
>
> (R. 49)

In sum, the Louisiana Supreme Court, following the Collector's argument, held that although there was discrimination against Halliburton this was all right, because ". . . the . . . matter does not involve a question of interstate commerce."

The Collector argued this point in his Motion to Dismiss (at pp. 10 and 13), saying that for Halliburton, this is

> ". . . *not an interstate commerce problem* but a problem of management in locating and so arranging its operations in such a manner as to reduce its cost of operations to a minimum.
>
> [and]
>
> ". . . taxpayer may reduce his tax burden by manufacturing equipment within Louisiana, for his own use."

Appellant has discussed this amazing argument in its

original Brief, at p. 65, under the heading: *"A Problem of Management. Save Louisiana Taxes by Manufacturing in Louisiana."*

At page 5 of his brief, the Collector argues:

> "The trial court agreed with Halliburton and rendered judgment in its favor.
>
> "On appeal by the Collector the Louisiana Supreme Court found that use tax is imposed after commerce is at an end; . . ."

At page 13, he argues:

> ". . . the property has been withdrawn from commerce at the time of taxation, and since commerce is at an end, there can be no tax upon interstate commerce."

In the *Silas Mason* case, Mr. Justice Cardozo made it clear that this type of reasoning could not justify discriminatory taxation. He said:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, *non-discriminatory* in its operation, when they have become part of the common mass of property within the state of destination . . .
>
> * * *
>
> "For like reasons they may be subjected, when once they are at rest, to a *non-discriminatory* tax upon use or enjoyment."[11]

It is completely clear that the arguments here advanced by the Collector cannot be used to justify "discriminatory" taxation.

---

[11] 300 U.S. 582, 583. Italics supplied.

Despite the clear words of Mr. Justice Cardozo, the Collector (toward the end of his brief) seems to feel that he can justify a frankly discriminatory tax because interstate commerce ". . . is at an end." The very last paragraph of the Collector's brief contains this emphatic language:

> "The tax is imposed *for one reason only*—because the property has become a part of the mass of property in the state . . ." (Appellant's Brief at p. 27. Emphasis supplied.)

Noting the three-to-one ratio of discrimination which exists here, against the interstate transaction, we submit that there is no theory upon which it can be justified constitutionally. It matters not whether this case be regarded as one of discrimination against interstate commerce, or as one of denial of due process of law by arbitrary and discriminatory taxation, or as a denial of equal protection of the laws.

Due process of law demands that

> ". . . the law shall not be unreasonable, arbitrary or capricious . . ."*

If this is not a discrimination against interstate commerce because "commerce is at an end," then it is arbitrary and discriminatory classification—for tax purposes—, the separate (and heavier) tax treatment being based solely upon the history of there having been interstate movement of goods. No matter how thin the argument is sliced, the Collector is still demanding *three-times-as-much-tax* as he would demand if there were no multistate activity and interstate movement of goods. No operative fact distinguishes the two situations

* *Nebbia v. New York*, 291 U.S. 502, at p. 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

except the existence in one case, and the non-existence in the other, of the interstate commerce element.

We submit that the interstate commerce clause, and the due process clause, and the equal protection of the laws clause, sufficiently arm this Court with power to prevent Louisiana from openly impeding the interstate movement of goods.

Aside from the operations of the interstate commerce clause, we submit that the *due process* clause and the *equal protection of the laws* clause would suffice to strike down the arbitrary and unreasonable discrimination which the Collector would practice here.*

* * *

Having confessed the discrimination, the Collector may not "avoid" the conclusion of unconstitutionality by contending that ". . . the property has been withdrawn from commerce at the time of taxation."

Third. Discrimination Is a Matter of Semantics.

The next confession and avoidance plea of the Collector lies in his effort to convince this Court that—although there is a substantial *de facto* tax discrimination against interstate operator here, to the extent of better than three-to-one, this is not really and truly unconstitutional discrimination because the Collector is *able to describe* the two tax situations *in similarly sounding words!*

His undocumented argument runs like this:

"In order to levy any tax, a legislature must establish four considerations:

(1) It must designate who the *taxpayer* will be.

* See p. 38, below, under heading *Equal Protection of the Laws—Due Process*, for further discussion of this point.

(2) It must establish the . . . *taxable moment.*

(3) It must establish the *bases* upon which the tax will be computed.

(4) It must establish the *rate* of the tax."

(at p. 11)

Then the Collector asserts:

"The *sales* and *use* taxes are . . . identical taxes.

"The *taxpayer*, the *moment of taxation*, the *measure of the tax* and the tax *rate* are the same."

(Brief of Appellee, p. 21, Emphasis by the Collector)

Close examination of the arguments made by the Collector reveals that, although the tax *rate*, at 2%, is indeed the same in both taxes, nothing else set forth in the last quoted statement is correct.

The Taxpayers Are Not the Same.

If one follows the Collector's comparison, the taxpayers which he chooses to compare are not the same. He chooses to compare the acts of a purchaser-at-retail in Louisiana with the activity of Halliburton which is a manufacturer-user, using its own work product. See Appellant's original Brief, at p. 60, under the heading: *"The Collector Would Compare the Incomparable."*

Appellant respectfully submits that the only proper comparison, to test for the presence or absence of discrimination, is to compare the operations of a manufacturer-user in the two situations, one a manufacturer-user with multi-state operations and interstate movement of goods, the other a manufacturer-user in an identical operation absent only the factor

of multi-state operations and interstate movement of goods. Such a comparison is studiously avoided by the Collector because it is fatal to his position. On this point, we respectfully refer this Court to the excellent statement from the brief *amicus curiae* of Chicago Bridge and Iron Company, which we have quoted at page 61 of Appellant's original Brief.

As was pointed out in Appellant's original Brief, one of the Collector's basic fallacies is that he would ignore (and would have the Court ignore) the fact that Halliburton is a manufacturer which uses its own product. Halliburton is a "manufacturer-user" or "producer-consumer." This is an important operative fact.

We respectfully focus the attention of the Court upon the fact that Halliburton is a "manufacturer-user," in whose operation there exists the element of multi-state activity and interstate movement of goods.

We respectfully suggest that the test for discrimination versus non-discrimination can be fairly made by comparing Halliburton's tax burden (as asserted by the Collector) with that of an identical "manufacturer-user" in exactly the same situation, absent only the elements of multi-state activity and interstate movement of goods. We assert that this is the one and only comparison that can be made fairly.

The taxpayers compared by the Collector are *not* the same.

The Tax Bases (and the "Taxable Moments") Are Not the Same.

It is here that the Collector has fully exerted the thrust of his argument and most fully propounded his error.

The tax *rate* (at 2%) is the same for both taxes. And, if we choose the *taxpayers* (fairly) for the comparison, i.e., an intrastate "manufacturer-user," and an interstate "manufacturer-user," this leaves for consideration only the Collector's criteria numbered "(2)" and "(3)," namely

(2) "the taxable moment," and

(3) "The bases upon which the tax will be computed."

At the outset, it should be noted that the Collector's criterion, "Moment of Taxation" is not really a third independent criterion. It is merely one of the factors used by the Collector in arriving at his tax "bases." He says ". . . both taxes are based upon cost." But he reaches two different figures for "cost" in the two situations by using two different "moments of taxation."

It is of interest that the Collector uses the word "bases" in the plural. For, of course, it is by the use of two different tax bases that he achieves two different tax results. If the tax rate is the same (2%) in each case—and it is—then, of course, the unequal tax result could only be reached by the application of that rate to two different bases.

The Louisiana Collector purports to apply the 2% tax rate to identical bases. He puts it this way:

> "Both taxes are imposed upon *cost*[12] to the taxpayer at the moment of taxation."[13]

Thus the Collector tells us that he applies both taxes to "cost."

[12] Italics by the Collector.
[13] Appellee's brief, p. 16.

Let us consider what elements go into the "cost."

We are considering the ultimate "use" of complex mobile scientific equipment. Photographs of this equipment appear at R. 16 and 17.

As to this equipment, before it could be "used" at all, the manufacturer-user necessarily incurred two separate and substantial elements of "cost," namely:

I. The "cost" of the *physical components*, e.g., the truck chassis, the scientific instruments, etc. (About *one-third* of total "cost.")

II. The "cost" of the *labor and shop overhead*, necessarily incurred to convert the components into a usable end-product. (About *two-thirds* of total "cost.")

The Louisiana Collector has simply elected to include both of these elements of "cost" (I. and II.) when he fixes the tax base for the inter-state tax, whereas, in the intra-state tax, he would exclude Element No. II (the labor and shop overhead) from the tax base.

The physical and economic activity of the taxpayer, Halliburton, (and of its intra-state competitor, if it had one) is properly and completely described as follows:

First: The Manufacturing—

Step No. 1. The taxpayer purchased certain physical components.

And incurred certain "cost" (Cost Element No. I) in so doing.

Step No. 2. The taxpayer improved those physical components, and converted them into a usable finished product.

And incurred additional "cost" (Cost Element No. II) in so doing.

Second: The Using—

The taxpayer used that end product, under contract, to service oil wells in Louisiana.

The Louisiana Collector has arrived at the two different tax "bases" by choosing two different "moments of taxation." In the interstate situation, he fixes his "moment of taxation" at the end of the manufacturing phase, thus including in his tax base both Cost Element No. I. (the components) and Cost Element No. II. (the labor and shop overhead). On the other hand, in the wholly intrastate situation, he fixes his "moment of taxation" at the end of Step No. 1 of the manufacturing phase, thus excluding from the tax base Cost Element No. II.

By shifting what he describes as ". . . the taxable moment . . .," the Collector would:

A. In the case of the sales tax (intra-state tax) fix the "taxable moment" *before* the expenditure of labor and overhead.

B. In the case of the use tax (inter-state tax) fix the "taxable moment" *after* the expenditure of the labor and overhead.

But, the Collector's ultimate result is clear—In the wholly intra-state situation, he would not apply the 2% tax to the labor and shop overhead element of cost. Only where there is the added element of multi-state activity and interstate

movement of goods would the Collector tax the labor and shop overhead element of cost. This, we submit, is "discrimination" against the interstate transaction.

The Collector has reached the two different tax results by choosing two different "taxable moments" thus producing two different tax "bases" upon which to apply his 2% rate.

Yet he inaccurately argues:

> "The sales and use taxes are . . . identical taxes. The *taxpayer*, the *moment of taxation*, the *measure of the tax*, and the tax *rate* is the same. . . ." (at p. 21)

The Collector would have us lose sight of the fact that he has fixed two different taxable moments. He refers to "the" taxable moment. He says:

> "Both taxes are imposed upon *cost* to the taxpayer at *the* moment of taxation. What the cost was before that moment is of no concern to the State of Louisiana, and what its cost, value or price is after that moment of taxation cannot be of concern to the State of Louisiana."[14]

The Collector would be correct, and it would be of no concern to Louisiana to equate the two taxes, were it not for the fact that the interstate commerce clause, and the due process clause, and the equal protection of the laws clause, of the Federal Constitution forbid discriminatory taxation of interstate commerce. Wherever ". . . in its practical operation . . ." a tax discriminates against interstate commerce, it is void. Multi-state activity and interstate movement of goods cannot, in themselves, constitutionally generate an additional tax burden.

[14] Appellee's Brief, at pp. 16-17. Emphasis supplied.

Discrimination in the Tax Bases Could Be Avoided —In Two Ways—

By his repetitive assertion that the two taxes are ". . . perfectly complementary . . ." and provide "perfect equality of treatment . . .," the Louisiana Collector acknowledges the duty of the State of Louisiana to equate the inter-state tax and the intra-state tax.

Louisiana could provide equality of treatment in either of two ways: The State could include Cost Element No. II. (labor and shop overhead) in the tax base of the intrastate situation, or the State could exclude Cost Element No. II. from the tax base of the inter-state situation. Either of these methods would abolish the inequity (the "discrimination") of which appellant here complains. What Louisiana cannot constitutionally do is to include in the tax base of the multi-state operator a substantial element of cost, while at the same time excluding that element of cost from the tax base of the intrastate operator whose activities are the same except for the absence of inter-state movement.

What Halliburton "used" in Louisiana was not the collection of raw components, but its complex finished product, in the production of which it has incurred both Cost Element No. I. and Cost Element No. II.

If Halliburton were to move its fabrication shops into Louisiana (as the Collector suggests that it do if it would avoid this tax),[15] again the item which it would ultimately "use" in Louisiana would be the finished end product.

[15] See Appellant's original Brief, at p. 65, for discussion of this unusual argument.

Now, if the Louisiana tax law did, in fact, tax the labor and shop overhead of the intra-state manufacturer-user (as well as that of the interstate manufacturer-user), then Halliburton would have no complaint here. There would be "perfect equality of treatment."

But the Collector has stipulated that, under the Louisiana tax law, the labor-and-shop-overhead element is taxed only in the interstate situation. And from the Collector's published letter ruling, of July 13, 1956,[16] which is most interesting, we learn that in the wholly intra-state situation ". . . direct labor charges [are] deductible in arriving at the cost basis . . ."

In contrast, by his letter ruling of October 10, 1956,[17] the Collector tells us that in the inter-state situation "cost" includes not only "the materials used," (Cost Element No. I), but also the cost of ". . . fabrication and assembly, labor [and] overhead, ..." (Cost Element No. II.). The Collector's stipulation is, of course, in accord.

Appellant taxpayer remains unable to read any complexity into this problem. The Collector has stipulated that he would demand his tax only where there is multi-state activity and inter-state movement of goods. There is no other operative fact to distinguish the non-taxable situation and the situation in which the Collector demands his tax money. The Federal Constitution forbids such discrimination against interstate commerce.

Using similarly sounding words, the Collector has argued that in both the use tax and the sales tax the "moment of

[16] See Appendix B, Appellant's original Brief at pp. 83-84.
[17] Appellant's original Brief, pp. 14-15.

taxation" is the same and that the "tax bases" are the same. In fact, the Collector has chosen two different "moments of taxation," in order to produce two different tax bases. He properly uses the word "bases" in the plural. For the interstate operator (Halliburton), he chooses a "moment of taxation" *after* the entire manufacturing process has been completed. For the intrastate operator, the Collector has chosen to fix his "moment of taxation" midway in the manufacturing phase of the operation, just *after* the purchase of components and just *before* the expenditure of *labor and overhead*. Thus, by increasing the tax base, he would increase the tax burden of Halliburton to 300% of what that burden would be for an intrastate operator "in similar circumstances."

We submit that the Collector has selected two different tax bases; that he is incorrect when he contends that ". . . the taxes are identical. The measure of the tax is the same." Since the rate is the same, at 2%, if the tax "bases" were the same, the tax result would be the same. But it is not so here. *Ergo*, the bases are not the same.

The Collector has talked about the two situations in similarly sounding words but—in truth and in fact—

a. The "taxpayers," in his comparisons, are *not* the same.

b. The "moments of taxation" are *not* the same.

c. The tax bases (the measures of the two taxes) are *not* the same.

Fourth: Lack of Jurisdiction to Not Tax

To further confess and avoid, the Collector argues obli-

quely, throughout his brief, that somehow Louisiana lacks jurisdiction to equate the interstate tax with the intrastate tax, even assuming a gross discrimination. And, at p. 22 of his brief, the Collector argues directly that:

> "Louisiana lacks competence to tax or exempt transactions occurring outside of its jurisdiction. How can it look to the sale in Oklahoma in determining its tax basis? It can only look to value at the moment the property becomes subject to its taxing jurisdiction."

We respectfully submit, without laboring the point, that when Louisiana comes to fix the tax base for the use tax, upon the use of equipment imported to Louisiana from Oklahoma, Louisiana has *jurisdiction to exclude* from that tax base any element of cost which it excludes from the tax base of one who operates entirely within Louisiana. Louisiana has *jurisdiction to not tax* any element in the interstate case which it chooses to *not tax* in the intrastate case. Louisiana not only has such jurisdiction to exclude, the interstate commerce clause requires its exercise in this case.

We submit that Louisiana has ample jurisdiction and power to equate the two tax situations by doing one of two things:

> *Either*, Louisiana can include the labor and shop overhead in the tax base of the intrastate operator, as well as in that of the interstate operator. Surely it lacks no jurisdiction to do this.
>
> *Or*, Louisiana can exclude the labor and shop overhead from both situations, interstate, as well as intrastate. Obviously, Louisiana has jurisdiction to "not tax" this Cost Element No. II. in both cases.

The Collector argues:

> ". . . Louisiana lacks competence to . . . exempt transactions occurring outside its jurisdiction. . . ."[18]

He argues that Louisiana cannot consider any facts that occurred outside Louisiana.

The gross sophistry of this argument is revealed by the mandate of the Sales and Use Tax Statute. Louisiana must look outside the state and into the past, and give credit for sales taxes already paid in other states. At page 14 of the Collector's brief he argues this point, and cites the statute, as showing the equitable nature of the Louisiana tax law.

We respectfully submit that the idea of ". . . lack of jurisdiction to *not* tax . . ." is a new concept in Anglo-American jurisprudence; that it is utterly without validity.

Fifth: Good Intentions May Excuse Discrimination

Throughout his brief the Collector argues that the Louisiana Legislature *intended* to provide equality of treatment to the interstate and the intrastate transactions. He cites Section 305[19] for the statement of legislative intent. He argues that such lip service is enough to satisfy the interstate commerce clause. He takes the position that discrimination in fact is excusable if there is a statement of intention not to discriminate.

[18] Appellee's Brief, at p. 22.

[19] R.S. 47:305, reproduced at p. 81 of Appellant's Original Brief.

We submit that the tax result actually reached and not the words of the statute nor the motive and intent which prompted its passage—is the only criterion which can be used here.

We submit that this argument by the Collector is wholly specious.

Mr. Jones' Boat. The Collector's Hypothet.

At pages 24-25 of his Brief, the Collector has assumed that a Louisiana resident purchased materials and parts for a cabin cruiser for $5,000, and that he paid his 2% tax (under the sales and use tax law) on that $5,000.

The Collector then supposes that by the expenditure of labor and overhead, Mr. Jones has produced a boat which has a "retail value" of $15,000. Describing his own question as an "absurdity," the Collector asks:

> "Must the State now come again to the taxpayer for an additional 2% on the increased value? Does equality demand such a tion?"
>
> (at p. 25)

Since the tax statute speaks of "cost price" and not of "retail value," we will change this hypothet slightly and say that, Mr. Jones bought his component parts for $5,000 (Cost Element No. I.) and then employed workmen to build the boat for him, at an additional cost, for labor and overhead (Cost Element No. II.) in the sum of $10,000. When finished, the total "cost" of the boat would be:

Cost Element No. I (components)	$ 5,000.00
Cost Element No. II (labor and overhead)	10,000.00
TOTAL "cost"	$15,000.00

Now, let us ask the Collector's (absurd?) question. Does equality demand that the State come again to the taxpayer for an additional 2% on the increased "cost"?

If the Collector is to be upheld in collecting 2% of the total "cost" (on both Cost Elements I and II) in the interstate situation, then we say that the answer to the Collector's question is "Yes." Equality does demand the same tax treatment of the intrastate situation.

Suppose that our Louisianian, Mr. Jones, after he bought the $5,000 worth of components (Cost Element No. I incurred) decided not to have it built in Louisiana, and concluded that it would be a good idea to have these components put together at a shipyard in Biloxi, Mississippi.[9] And suppose that he took his components to Biloxi and had the boat built there. Then suppose he floated it, or trailered it, back into Louisiana, across the interstate boundary line. Now, what taxes would the Louisiana Collector demand under the sales and use tax statute?

Clearly, the situation here would be precisely analogous to the present Halliburton situation. Because the manufacturing phase of the operation occurred outside the state, the Collector would demand a 2% tax on the entire cost, namely, I. cost of components and II. cost of labor and overhead ex-

[9] Assuming, hypothetically, that Mississippi had no sales tax.

pended to convert the raw components into an end-product suitable for use.

Again, we say that Louisiana has a clear choice of two methods in which to equate the tax treatment of the two situations. Louisiana could include both Cost Elements (I. and II.) in the tax base in the intrastate situation, and in the inter-state situation; or, it could exclude Cost Element No. II. (Labor and overhead) from the tax base in the inter-state situation, as well as in the intra-state situation.

But, what Louisiana cannot constitutionally do is to include the labor and overhead in the tax base of the inter-state operator while excluding it from the tax base of the wholly intra-state operator. The inter-state commerce clause compels the Collector to administer his tax statute so that ". . . in its practical operation . . ." it will not ". . . work discrimination against interstate commerce. . . ."

Amazingly—among the number of contradictory and specious arguments which the Collector has advanced, and then abandoned, during the course of this litigation—, the Collector once argued that Louisiana did equate the taxes by taxing the labor and overhead in the *intrastate* situation. It is agreed that the entire record may be referred to, by counsel, and the Collector's brief to the Louisiana Supreme Court is a part of that record. At pages 3-4 of his Brief to the Louisiana Supreme Court, the Collector argued:

> "The Collector certainly does not concede, however, that one who manufactures equipment for his own use in Louisiana does not owe a use tax upon the entire value or 'cost' of the completed item, subject to a credit for

> the sales tax paid for parts and materials used in the manufacture of the items. . . ."
>
> ". . . the Collector has always insisted that . . . [such] a tax . . ." be paid.

This flatly incorrect argument is discussed and analyzed at pages 62-66 of Halliburton's (blue) brief to the Louisiana Supreme Court, under the heading *"The Collector Attempts to Disavow his Own Stipulation of Facts."* As noted, the Collector no longer makes this argument. Indeed, he now says it would be an "absurdity" to suggest it.

Before leaving Mr. Jones and his sea-going tax problems, we point out that, if he had bought his vessel already factory-finished and ready-made at a Louisiana shipyard, there would have been no 2% sales tax on the transaction because the Louisiana Sales Tax exempts vessels "built in Louisiana" shipyards.[21] Of course, if he had bought his ready-made boat at a Mississippi or Alabama[22] shipyard, its subsequent use in Louisiana would generate a 2% use tax and there is no comparable exemption for vessels "built outside Louisiana."

We note the Collector's argument that, if Mr. Jones brought a $50,000 vessel into Louisiana from another state:

> "If the taxpayer had brought the completed boat into the State, a 2% tax on the $50,000 would have been imposed, because that was its value when Louisiana first acquired jurisdiction."

[21] La. R.S. 47:305.1, reproduced in Appendix "A" to Appellant's Original Brief, at p. 82.

[22] Assuming, hypothetically, that these states did not have sales tax laws.

Clearly, the Collector would demand the use tax on imported boats, although the sales and use tax statute specifically exempts vessels "built in Louisiana" shipyards. See Appellant's original Brief, at p. 53, under the heading "*Louisiana Plans Further Discrimination.*" See also the Brief *Amicus Curiae* of Thomas Jordan, Inc.

Re Isolated Sales:

The Collector argues that the lack of an isolated sales exemption from the use tax does not discriminate against the out-of-state vendor and in favor of the Louisiana market. He insists that it does not penalize Halliburton for going outside the state to make its casual purchase. He argues that it does not discriminate against the interstate transaction and in favor of the transaction which is wholly intrastate. He says, *inter alia:*

> ". . . all property sold at isolated sales within the state has already been the subject of a two per cent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use . . ."
>
> (Appellee's Brief, at p. 22)

It is simply not a fact that ". . . all property sold at isolated sales within the state has already been the subject of a two per cent (2%) tax, either sales or use . . . ."

It is unnecessary to go beyond the confines of matters already under discussion to find two examples which illustrate the error of the Collector's statement. Hailiburton's "Labor and Shop Overhead Phase," and the Brief, *Amicus Curias* of Thomas Jordan, Inc., (dealing with vessels "built in Louisiana") afford two illustrations in point.[23]

[23] See p. 82 and p. 55 of Appellant's original Brief.

Take the situation in which an intrastate manufacturer-user put together in Louisiana an item for its own use, as to which a substantial portion (e.g., two-thirds) of the cost-price was in labor and overhead. A 2% tax would have been paid only on the cost of the components and not on the portion of the cost-price attributable to labor and overhead. Upon a casual sale of such an item, in Louisiana, there would be no sales tax on the transaction, and only a fraction (one-third) of the cost-price (Cost Element No. I) would have already borne its 2% tax.

Take the situation of a vessel "built in a Louisiana shipyard." The purchaser would pay no sales tax on the purchase price because of the specific exemption. And if another purchaser subsequently bought the boat at a casual sale, in Louisiana, there would be no sales tax upon the casual sale because of the casual sale exemption. On the other hand, if this second purchaser (e.g., Mr. Jones) had gone outside Louisiana and purchased an identical vessel at a casual sale, Louisiana would demand the 2% use tax because, unlike the sales tax, the use tax contains no isolated sale exemption.

It is submitted that the Collector's position is unsound. Please see p. 18, *et seq.*, of Halliburton's Original Brief for a full discussion of this phase.

The Authority Cited by the Collector Does Not Support His Position.

This Court has held:

> "The commerce clause forbids discrimination whether forthright or ingenious. . . ."[24]

[24] Best v. Maxwell, 311 U.S. 454, 61 S.Ct. 335, 85 L.Ed. 275 (1940).

This is a case of forthright discrimination which the Louisiana Collector has ingeniously described.

This Court has said:

> "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will *in its practical operation* work discrimination against interstate commerce."[25]

The *only* case cited by the Louisiana Collector, to support his position, is *Henneford v. Silas Mason Company.*[26] In that case, this Court upheld the constitutionality of a non-discriminatory use tax, saying:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, *non-discriminatory in its operation,* when they have become part of the common mass of property within the state of destination. . . .
>
> . . .
>
> "For like reasons they may be subjected, when once they are at rest, to a *non-discriminatory tax* upon use or enjoyment."[27]

This Court upheld the constitutionality of the use tax in the *Silas Mason* case upon finding that, in the "practical operation" of the taxes, there was a precise equality of tax burden

---

[25] *Best v. Maxwell,* 311 U.S. 454, 61 S.Ct. 335, 81 L.Ed. 275 (1940).

[26] 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1936).

[27] 300 U.S. at pp. 582, 583.

in the (intrastate) sales tax and in the (interstate) use tax. Mr. Justice Cardozo pointed out that the State of Washington use tax *specifically exempted the Halliburton situation,* which is now before this Court, saying of the Washington use tax statute:

> "Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. . . .
>
> (300 U. S. at p. 580)
>
> * * *
>
> "The tax presupposes everywhere a retail purchase by the user before the time of use. *If he has manufactured the chattel himself, . . . he is exempt from the use tax* whether title was acquired in Washington or elsewhere.
>
> (at p. 581)
>
> * * *
>
> "A non-discriminatory tax . . . has never been regarded as imposing a direct burden upon interstate commerce. . . ."
>
> (at p. 582)
>
> * * *
>
> "The tax upon the use . . . is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.
>
> "Equality is the theme that runs through all the sections of the statute."
>
> (at p. 583. Italics supplied.)

And, Mr. Justice Cardozo made it clear that the test was not one of form but of whether ". . . there was any substantial discrimination in fact." (at p. 585)

Of course, there is substantial "discrimination in fact" in this case, since the Collector would require Halliburton to pay more than three times as much tax, in this case, as he would have required if the elements of multi-state activity and interstate movement of goods were lacking.

All Authorities Support Halliburton's Position

We reiterate this point, which has been demonstrated amply in our original brief. For the convenience of this Court, we refer to the extensively annotated comments in 129 ALR 222, entitled *"Constitutionality, Construction and Application of General Use Tax or Other Compensating Tax Designed to Complement State Sales Tax."* This annotation is supplemented in 153 ALR 609.

As the Supreme Court of the United States put it in *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939):

> "The prohibited burden upon commerce between the states is created by state interference with that commerce, ... A discrimination against it, or a tax on its operations as such, is an interference."
>
> (306 U.S. at 177-178, 83 L.Ed. at 593)

Careful combing of the jurisprudence of the states which have Sales and Use Tax statutes has revealed only one additional decision in which the point here at issue was discussed. In *Gray v. Oklahoma Tax Commission*,[28] the Supreme Court of

[28] No. 39211, Nov. 28, 1961, published in Vol. 32 of "The Journal," published by Oklahoma State Bar Association, at p. 2106.

Oklahoma considered the effect of a repeal of the *sales* tax section which dealt with livestock feed. At issue was the question of whether or not this left in effect the *use* tax upon feed purchased in other states. "The contention of the plaintiff [was] . . . that this 2% levy on out-of-state purchases constitutes a levy on interstate commerce and is, therefore, unconstitutional." (at p. 2106)

The Oklahoma Supreme Court found it unnecessary to pass upon the constitutional question, pointing out that the use tax specifically provided that its provisions ". . . shall not apply . . . to the use of . . . property now specifically exempted from taxation under the . . . Sales' . . . tax . . ." The Court said:

> "The Legislature was cognizant of the restrictions imposed by the commerce clause of the Federal Constitution, and it was undoubtedly to escape the imposition of any invalidity by that document that the exemption quoted was made."
>
> (at p. 2107)

It is Halliburton's conclusion that every written utterance in existence, save only the words of the Louisiana Supreme Court and the Louisiana Collector, supports Halliburton's sound position.

Equal Protection of the Law—Due Process of Law

The Collector states that the Louisiana Sales and Use Tax operates "the same" upon all persons "similarly situated."

The Collector has chosen to put Halliburton into a different "classification" from an intrastate operator in the same line of endeavor.

His dual classification of persons "similarly situated" is as follows:

CLASSIFICATION "A" To be taxed more heavily— (Ratio here: 3-to-1)	Those who operate in interstate commerce.
CLASSIFICATION "B" To be taxed lightly— (Ratio here 1-to-3)	Those who operate wholly within the State of Louisiana.

Thus, Classification "A" taxpayers (interstate operators) are all "similarly situated," and are all taxed heavily. And, Classification "B" taxpayers (intrastate operators) are all "similarly situated." They are all taxed more lightly.

It is upon these facts that the Collector argues:

> ". . . the position of each taxpayer . . . *similarly situated* . . . is identical."
>
> (Brief of Appellee at p. 21)

* * *

The Collector, and the Louisiana Supreme Court, take great comfort from the argument that this use tax is

> ". . . not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end."
>
> (Brief of Collector, at p. 20)

and the concluding paragraph of the Collector's Brief states:

". . . The tax is imposed for one reason only—because the property has become a part of the mass of property in the State . . . ."

(Ibid., at p. 27)

The Louisiana Supreme Court seemed to base its decision on this point, saying:

". . . We conclude that . . . the use tax as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress. The taxed matter herein had definitely come to rest in Louisiana . . ."[29]

and, the Court added:

". . . 'Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, . . .'"[30]

Now, it seems to us—and we submit to this court—that where the test for the levy or non-levy of the discriminatory tax is the existence or non-existence of interstate commerce, then the interstate commerce clause—standing alone—is quite enough to void the discriminatory tax. Thus, Halliburton would base its conclusions here upon the protection afforded by the interstate commerce clause.

Nevertheless, quite aside from the operations of the interstate commerce clause, we submit that this is a case of gross discrimination which is forbidden by the equal protection of the laws clause and the due process clause.

Assume, *arguendo*, that Halliburton were a wholly intrastate operator, sitting side-by-side, in Louisiana, with another

[29] Reproduced at p. 61 of Appellant's Jurisdictional Statement.
[30] *Ibid.*, at p. 63.

intra-state operator. And assume that Halliburton was being taxed three-times-as-heavily as this neighboring competitor, just as it is here.

It is Halliburton's position that there is simply no excuse in law for taxing it three-times-as-much as another company —in exactly the same business—would be taxed, even if there were no interstate commerce element here. *A fortiori*, such tax discrimination cannot be valid where the only criterion of taxability is the presence or absence of interstate movement of goods.*

We here cite some of the pertinent decisions of this Court:

(1) *International Harvester Co. v. Dept. of Treasury (Indiana)*, 322 U.S. 340, 88 L.Ed. 1313 (1944).

Concurring opinion of Mr. Justice Rutledge:

> " 'Due Process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. Cf, e.g., Western U. Teleg. Co. v. Kansas, 216 U.S. 1, 54 L.Ed. 355, 30 S.Ct. 190. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes upon commerce among the states becomes 'undue.' "
>
> (322 U.S., at 353, 88 L.Ed. at 1321, 64 S.Ct. 1019)

* * *

(2) *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 93 L.Ed. 1545 (1949)

---

* Actually, after "commerce is at an end," Halliburton is a purely intrastate operator, with a history of interstate commerce in the past. It is this history of interstate movement which gives rise to separate tax "classification" by Louisiana.

Here the State of Ohio imposed an ad valorem tax upon intangible property such as notes and accounts receivable, owned by foreign corporations and owing from out-of-state debtors, but exempted at the same time identical property owned by its residents and domestic corporations.

Held: Tax is invalid as violating the equal protection clause of the Fourteenth Amendment.

Mr. Justice Jackson said:

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection . . . .
>
> (377 U.S. at 571)
>
> * * *
>
> "We think these discriminations deny appellants equal protection of Ohio law."
>
> (at p. 574)

Concerning the *Wheeling* case, Mr. Justice Brennan said in a separate opinion in *Allied Stores of Ohio v. Powers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480 (1959):

> ". . . Wheeling teaches that a distinction which burdens the property of nonresidents but not like property of residents is outside the constitutional pale.
>
> * * *
>
> ". . . The proper analysis, it seems to me, is that Wheeling applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against residents of other state members of our federation."
>
> (3 L.Ed. 2d at p. 488)

* * *

(3) *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949)

Mr. Justice Douglas said:

". . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state."

(336 U.S. 174, 93 L.Ed. at p. 589)

* * *

". . . Interstate commerce can be made to pay its way by bearing a *non-discriminatory* share of the tax burden which each State may impose on the activity or property within its borders."

(336 U.S. 174, 93 L.Ed. 590)
(Italics supplied.)

* * *

(4) *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 4 L.Ed. 2d 384, 80 S.Ct. 474 (1960)

This decision deals with taxation of certain property owned by the United States, but its language relating to discrimination and classification is very pertinent here:

Mr. Chief Justice Warren (for a unanimous court) said:

"The discrimination seems apparent. The question, however, is whether it can be justified . . .

(at p. 389)

"The taxing statute 'does not operate in a vacuum. . . . it is necessary to see how other taxpayers similarly situated are treated.'

"We must focus on the nature of the classification. . . . The imposition of a heavier tax burden . . . must be justified by significant differences between the two classes."

* * *

(5) *General Trading Co. v. State Tax Commission (Iowa)*, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944)

Dealing with Iowa use tax, Mr. Justice Frankfurter said:

"Of course, no State can tax the privilege of doing interstate business. See Western Live Stock v. Bureau, 303 U.S. 250, 82 L.Ed. 823, 58 S.Ct. 546, 115 ALR 944. This is within the protection of the Commerce Clause and subject to the power of Congress.

"On the other hand, the mere fact that property is used for interstate commerce or has come within an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his *fair share*. But a *fair share* precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best v. Maxwell*, 311 U. S. 454, 85 L.Ed. 275, 61 S.Ct. 334."

(322 U.S. 339, 88 L.Ed. at 1312. Italics supplied.)

Arbitrary, unreasonable and discriminatory classification for tax purposes is a violation of the due process and equal protection of the laws clause. One of the most thorough discussions of the limitations upon state action, imposed by these two clauses is found in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, at p. 559, 22 S.Ct. 431, 46 L.Ed. 679, at p. 689 (1902), to which this Court is respectfully referred. Portions of that

opinion (which is not a tax case) are reproduced as Appendix "A," to this brief.[31]

In sum, we submit that the cumulative fiat of the due process clause, and the equal protection of the laws clause, and the interstate commerce clause, strike down the arbitrary, discriminatory and capricious position which the Louisiana Collector takes here, in his efforts to lay a toll upon interstate commerce.

CONCLUSION

Upon the foregoing, appellant Halliburton Oil Well Cementing Company respectfully submits that all of its propositions herein are true, and correct, and sound, namely:

A. THE LAW: Tax discrimination against interstate commerce is forbidden by the Federal Constitution. This is the rule.

(This is admitted.)

B. THE FACT: The Louisiana Tax Collector is discriminating against interstate commerce.

(The discrimination, at a ratio of 3-to-1, is stipulated.)[32]

C. THE CONCLUSION: The discrimination by the Louisiana Tax Collector is an unconstitutional burden upon interstate commerce.

(All authority, and all reason, support this sound position of the Appellant.)

---

[31] Page 48, *infra*.

[32] The stipulation, to be exact, is that no tax would be due, if the interstate commerce element were lacking. See p. 9, *supra*, for quotation.

Appellant submits that the use tax, in this case, cannot constitutionally exceed what the sales tax would have been, had there been no element of interstate commerce. The interstate use tax cannot exceed the intrastate sales tax.

> "For, only if there is an *equivalency of tax burden* . . . can it be said that the purchasers of out-of-state goods are not discriminated against. . . ."[33]

Appellant submits that the position of the Louisiana Collector of Revenue is repugnant to the Constitution of the United States, and particularly the following clauses thereof: the *interstate commerce* clause, and the *equal protection of the laws* clause and the *due process* clause of the Fourteenth Amendment.

Appellant submits that the decision of the Supreme Court of the State of Louisiana should be reversed.

Respectfully submitted,

C. VERNON PORTER
BENJAMIN BROWN TAYLOR, JR.
TOM FORE PHILLIPS

Attorneys for Appellant, Halliburton Oil Well Cementing Company

Taylor, Porter, Brooks, Fuller & Phillips,
1100 Louisiana National Bank Building
Baton Rouge, Louisiana

Baton Rouge, Louisiana
February 14, 1962

---

[33] Hartman, Paul J., *State Taxation of Interstate Commerce*, Dennis & Co., Inc., Buffalo 3, N.Y., at p. 167. See p. 53 of Appellant's original brief for more complete quotation.

PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1962, I served a copy of the foregoing *Reply Brief for the Appellant*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

(1) Roland Coereham, Collector of Revenue, Appellee
℅ Chapman Sanford, Attorney of Record, and
John B. Smullin, Attorney of Record
Capitol Annex Building
Baton Rouge, Louisiana

(2) Humble Oil and Refining Company, *Amicus Curiae*
℅ Forest M. Darrough, Attorney of Record
1216 Main Street
Houston, Texas

(3) Chicago Bridge and Iron Company, *Amicus Curiae*
℅ Albert L. Hopkins, Attorney of Record
Hopkins, Sutter, Owen, Mulroy and Wentz, Attorneys
One North LaSalle Street
Chicago 2, Illinois

(4) Sperry Rand Corporation, *Amicus Curiae*
℅ Cicero C. Sessions, Attorney of Record
Sessions, Fishman, Rosenson & Snellings, Attorneys
1333 National Bank of Commerce Building
New Orleans 12, Louisiana

(5) Thomas Jordan, Inc., *Amicus Curiae*
% Charles D. Marshall, Attorney of Record
Milling, Saal, Saunders, Benson and Woodward
1122 Whitney Building
New Orleans 12, Louisiana

(6) American Can Company, *Amicus Curiae*
% Ben R. Miller, Attorney of Record
Sanders, Miller, Downing, Rubin and Kean
P. O. Box 1588
Baton Rouge, Louisiana

(7) Rosson Richards Processing Company, *Amicus Curiae*
% Robert E. Leake, Jr.
1207 Whitney Bldg.
New Orleans 12, Louisiana

(8) Wate-Kote Company, Ltd., *Amicus Curiae*
% Robert E. Leake, Jr.
1207 Whitney Bldg.
New Orleans 12, Louisiana

BENJAMIN BROWN TAYLOR, JR.
Attorney of Record for
Halliburton Oil Well Cementing
Company, *Appellant*

Baton Rouge, Louisiana
February 14, 1962.

APPENDIX "A"

In *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, at p. 559, 22 S.Ct. 431, 46 L.Ed. 679, at pp. 689-690 (1902), the Supreme Court dealt with the equal protection of the laws clause and the due process clause* and said:

> "What may be regarded as a denial of the equal protection of the laws, is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the *equal protection of the laws means* "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis*, 101 U.S. 22, 31, *sub nom. Bowman v. Lewis*, 25 L.ed. 989, 992. We have also said: 'The 14th Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without *due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be *no arbitrary deprivation* of life or liberty, or arbitrary spoliation *of property*, but that *equal protection* and security *should be given to all under like circumstances* in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of anyone except as*

* See p. 37 *et seq., supra*, for discussion.

applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' *Barbier v. Connolly*, 113 U.S. 27, 31, 28 L.ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 30 L.ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, in which it was also said that 'the equal protection of the laws is a pledge of the protection of equal laws.' In *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L.ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the 14th Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect.

* * *

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that *classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily* and without any such basis. . . . But *arbitrary selection can never be justified by calling its classification.* The equal protection demanded by the 14th Amendment

forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that *equality of rights* which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases *it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, —some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary* selection.' *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668, 670, 671, 17 Sup. Ct. Rep. 255, 257-259, 261. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cottong v. Godard, ante*, 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock-yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the 14th Amendment in that it denied to that company the equal protection of the laws."

(Italics supplied.)